IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RANDY W. GOLDSBERRY, Appellant.	No. 38344-6-II UNPUBLISHED OPINION

Armstrong, J. — Randy W. Goldsberry appeals his convictions for two counts of felony harassment with a deadly weapon, second degree assault with a deadly weapon, and second degree assault. He argues that (1) the bifurcated jury instructions on felony harassment omitted a required element; (2) there was insufficient evidence to convict him on one of the counts of felony harassment; (3) his counsel was ineffective for failing to argue that the felony harassment and second degree assault were the same criminal conduct; and (4) the trial court erred in imposing no-contact orders in excess of statutory maximums for the convicted crimes. In his statement of additional grounds (SAG), Goldsberry contends that his attorney was ineffective for failing to call witnesses and that some of the alleged conduct never occurred. We reverse and dismiss one of the felony harassment counts, affirm all remaining convictions, and remand for resentencing.

FACTS

On January 22, 2007, Randy Goldsberry showed up highly intoxicated at the gas station where his wife, Norene Williams, worked. Philomena Thomas, one of Williams's co-workers, informed Goldsberry that Williams was home sick and offered to drive him home. Shortly after arriving home, Goldsberry went into the bedroom where Williams was in bed to fetch his bow and

arrow from its case beside the bed. Williams attempted to wrestle the bow and arrow from Goldsberry. Williams finally relented and Goldsberry took the bow and arrow with him into the living room where Thomas was standing. He put an arrow in the bow, pulled the bow string back three-quarters of the way, pointed it at Thomas's forehead, and said, "Are you ready to die?" 1 Report of Proceedings (RP) at 59-60, 111; 2 RP at 154.

Goldsberry then ordered both women outside. Outside, he told Thomas to stop moving, stating, "You take one more move [and] you're dead." 1RP at 65. Goldsberry turned to Williams and told her to run across the street so he could shoot her in the back. When Thomas tried to interject, Goldsberry redirected the bow and arrow at her and said, "You're going to die right now." 1 RP at 69, 91. After Goldsberry went back inside, Thomas called 911.

Williams and Goldsberry re-entered the house when they heard their grandson, Jacob, crying inside. Kathleen Goldsberry, Jacob's mother and Goldsberry's daughter, refused to let Goldsberry hold Jacob.[1] Goldsberry grabbed Kathleen by throat and shoved her onto the bed. He got on top of her and started squeezing her throat until she had difficulty breathing and began to feel dizzy. Kathleen eventually managed to shove him away from her, grab her cell phone, and call 911. Goldsberry quickly left the scene, but the police apprehended him nearby.

The State charged Goldsberry with second degree assault and felony harassment of Williams, second degree assault and felony harassment of Thomas, second degree assault of Kathleen, and malicious mischief in the third degree.

At trial, the jury instructions on felony harassment were bifurcated[2] without objection or

[1] Kathleen Goldsberry is referred to as Kathleen throughout for the sake of clarity. We intend no disrespect.

[2] Bifurcated jury instructions, which purportedly guard against unfair prejudice and guarantee the

exception from defense counsel. The jury convicted Goldsberry of felony harassment of Williams, second degree assault and felony harassment of Thomas, and second degree assault of Kathleen. The jury found him not guilty of malicious mischief and failed to reach a verdict on the remaining assault charge.[3] Goldsberry received 42 months' total confinement. The court also entered a 10 year domestic violence no-contact order for Williams and a 10 year harassment no-contact order for Thomas.

ANALYSIS

I. Sufficiency of the Evidence

Goldsberry argues that the State failed to prove felony harassment against Williams. In considering a challenge to the sufficiency of the evidence, we construe the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Salinas*, 119 Wn.2d at 201.

A conviction for felony harassment requires the State to prove beyond a reasonable doubt that a defendant knowingly made a threat to kill and that the person threatened reasonably feared that the defendant would carry out the threat. RCW 9A.46.020(2)(b)(ii); *State v. C.G.*, 150

State meets its burden of proving each element, can be used to separate a single element from the "to convict" instruction to a special verdict form where such an element elevates the base crime from a misdemeanor to a felony. *State v. Roswell*, 165 Wn.2d 186, 197, 196 P.3d 705 (2008) (quoting *State v. Oster*, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002); *State v. Mills*, 154 Wn.2d 1, 10, 109 P.3d 415 (2005).

[3] Rather than retrying Goldsberry for the alleged assault of Williams, the State moved to dismiss the charge at sentencing.

Wn.2d 604, 609-10, 80 P.3d 595 (2003). Although Goldsberry threatened to kill Williams when he told her to run across the street so he could shoot her in the back, the State did not elicit any direct evidence that Williams believed Goldsberry would carry out the threat. Moreover the circumstantial evidence from which the jury could infer that Williams feared Goldsberry's deadly threat was equivocal even when viewed in the light most favorable to the State: Thomas testified that while outside, Williams was getting increasingly upset, verging on hysterical. When Goldsberry continued to badger her, asking her if she didn't think that he would do it, she responded, "No. I know you will." 1 RP at 115-16. Thomas also testified she heard Williams scream when Goldsberry pointed the bow and arrow at Thomas. Although she did not remember, Williams conceded that "maybe I was scared. All I remember is I was sick and this was ridiculously happening." 1 RP at 135.

While this evidence is sufficient to show that Williams was frightened, it falls short of proving she believed Goldsberry would carry out his deadly threat. To the contrary, Williams explained that she told Goldsberry she believed his threat to placate him. Williams testified she did not think Goldsberry was serious when he threatened to shoot her; in fact, her initial reaction to his threat was to argue with him, refusing to run across the street. She further testified that the only time she was scared of him was "when he had my daughter." 1 RP at 122. She also confirmed that in her written statement to the police, she stated she was not fearful of him and had no reason to fear him. When asked if the statement was true, she responded, "I felt that way. Yes." 1 RP at 125. Williams maintained she did not remember being scared of Goldsberry when he pointed the bow and arrow, and that "he had never hurt me. He had never hurt me before. . .

." 1 RP at 135.

Furthermore, her actions were consistent with this testimony. She initially attempted to wrestle the bow and arrow from Goldsberry. When they went outside, she stood less than a foot from him. Yet even after he threatened her, Williams continued to stand up to Goldsberry. When Goldsberry wanted to hold Jacob, she intervened, grabbing the baby from Kathleen and telling Goldsberry that he had to leave until he calmed down. According to Kathleen, Williams also intervened when Goldsberry attacked her: "[s]he [Williams] was trying to fight him off. Plling his hair and slapping him." 1 RP at 177. Deputy Plank testified that at the scene Williams appeared "kind of in shock and kind of upset," but when asked if she appeared frightened, he responded that he only remembered her "just kind of not being there." 2 RP at 201, 207.

Finally, Williams testified that in 18 years of living together, Goldsberry had never been violent with her. And Williams's divorce from Goldsberry became final just before the trial, eliminating the possibility she denied fearing Goldsberry's threat because she was still living with him. In sum, the State failed to prove beyond a reasonable doubt that Williams believed Goldsberry's threat to kill her. Accordingly, we reverse Goldsberry's conviction for felony harassment against Williams and remand for dismissal. *See C.G.*, 150 Wn.2d at 610; *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (dismissal is required following reversal for insufficient evidence pursuant to the double jeopardy clause of the Fifth Amendment).

II. Bifurcated Jury Instructions

Goldsberry claims the trial court erred in bifurcating the elements of felony harassment between the "to convict" instruction and a special verdict instruction. When read together,

according to Goldsberry, the instructions omit the element that the jury had find Thomas reasonably feared that Goldsberry would carry out the threat to kill.[4]

We review the adequacy of a "to convict" jury instruction de novo. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). In general, a "to convict" instruction must contain all elements essential to the conviction. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Although Goldsberry did not object to the jury instruction at trial, the omission of an element from an instruction is a constitutional error that the defendant can raise for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); RAP 2.5(a)(3).

A person is guilty of harassment if he knowingly threatens to cause bodily injury immediately or in the future to the person threatened and, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i), (b). When the threat to cause bodily injury is a threat to kill, the harassment constitutes a felony. RCW 9A.46.020(2)(b)(ii). But the State must also prove that the victim reasonably feared the defendant would carry out the threat to kill. *C.G.,* 150 Wn.2d at 609. While a bifurcated instruction is constitutionally permissible, the instructions must *clearly* set forth this requirement. *Mills*, 154 Wn.2d at 10-11 (emphasis in original).

In *Mills*, the Supreme Court considered virtually identical bifurcated jury instructions on felony harassment. *Mills*, 154 Wn.2d at 4 (reversing on the grounds that the jury instructions did not clearly set forth the requirement that the jury must find that the victim was placed in

[4] Goldsberry argues the trial court gave erroneous bifurcated instructions on the counts of felony harassment against both Williams and Thomas. As we have dismissed the felony harassment conviction involving Williams, we proceed only in relation to the count of felony harassment against Thomas.

reasonable fear that the threat to kill would be carried out). As in *Mills*, the "to convict" instructions here set forth the misdemeanor elements of harassment based on a threat to cause bodily injury. The court instructed the jury that in order to find Goldsberry guilty of the crime of harassment, it had to find beyond a reasonable doubt "(1) [t]hat on or about January 22, 2007, the defendant knowingly threatened to cause bodily injury immediately or in the future to Philomena Thomas, and (2) [t]hat the words or conduct of the defendant placed Philomena Thomas in reasonable fear that the threat would be carried out." Clerk's Papers (CP) at 28-30; *See Mills*, 154 Wn.2d at 13.

The special verdict form, which the jury was to answer only if it found Goldsberry guilty of misdemeanor harassment, asked, "Did the defendant's threat to cause bodily harm consist of a threat to kill the person threatened or another person?" CP at 55, 58; *See Mills*, 154 Wn.2d at 13. Nowhere was felony harassment separately defined. More importantly, nowhere was the jury instructed that it had to find beyond a reasonable doubt that Thomas reasonably feared that Goldsberry would carry out his threat to *kill* her. The jury might have believed it could convict Goldsberry if he placed Thomas in reasonable fear of bodily injury without considering whether he placed her in fear of being killed. *See Mills*, 154 Wn.2d at 15. Under *Mills*, the jury was not instructed on all elements required to convict Goldsberry.

Nonetheless, we review an instructional error to determine if it was harmless. And we will not reverse even if the instructions omit an element of the offense if uncontroverted evidence supports the element and we are satisfied beyond a reasonable doubt the jury would have reached the same verdict absent the error. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)

(quoting *Neder v. U.S.*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The *Mills* court was unable to find the error harmless. *Mills*, 154 Wn.2d at 15 n.7. But there, the defendant damaged the victim's car and left the victim phone messages, threatening to kill her and slit her neck. *Mills*, 154 Wn.2d at 5. The victim testified that she was "very scared" after the phone call and, given the defendant's criminal history, "thought all the more [the defendant] would carry out what she said she would do." *Mills*, 154 Wn.2d at 5. Here, in contrast, Goldsberry directly threatened Thomas by pointing the bow and arrow at her and stating, "You are going to die right now." And Thomas explicitly testified that she thought Goldsberry would kill her. Her actions support the testimony: she called 911 and told them if they did not get there soon she would die; she then covered herself in a pile of garbage to hide from Goldsberry. We are satisfied beyond a reasonable doubt the jury would have found that Thomas believed Goldsberry was going to kill her if properly instructed. The error in the bifurcated instructions was therefore harmless.

III. Effective Assistance of Counsel

Goldsberry contends that his counsel ineffectively represented him by failing to argue the second degree assault and felony harassment of Philomena Thomas were the same criminal conduct for the purposes of calculating his offender score. We agree.

We review a claim that counsel ineffectively represented the defendant de novo. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish that counsel was ineffective, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense, i.e., there was a

reasonable probability that but for the deficient performance the trial result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). A defendant must also overcome a strong presumption that counsel's conduct was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 988 P.2d 1251 (1995). Legitimate trial strategy or tactics cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

The trial court calculates an offender score for the purpose of sentencing by adding current offenses and prior convictions. RCW 9.94A.589(1). Prior and current convictions involving the "same criminal conduct" are calculated as one crime for sentencing purposes. RCW 9.94A.589(1)(a). Convictions will count as the "same criminal conduct" only when (1) they share the same criminal intent; (2) they are committed at the same time and place; and (3) they involve the same victim. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006) (quoting RCW 9.94A.589(1)(a)). In determining whether two crimes share a criminal intent, a court should focus on the extent to which the defendant's intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). When numerous offenses are committed as part of a scheme or plan, a single intent exists if there is no substantial change in the nature of the criminal objective. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990).

Counsel's failure to argue same criminal conduct could not have been tactical because the argument would not have exposed Goldsberry to any adverse consequences. Even if the trial

court rejected the argument, Goldsberry would have the same offender score he has now. Moreover, Goldsberry would likely have prevailed on the argument. The first two elements are clearly met: the assault and harassment had the same victim, Thomas, and happened at the same time and in the same place. The only disputable element is whether the two crimes shared the same criminal objective.

To prove the assault, the State had to show Goldsberry acted with the intent to make Thomas apprehensive and fearful of bodily injury. For felony harassment, the State had to prove that Goldsberry knowingly threatened to kill Thomas. Unlike in cases where the objective criminal intent necessarily changed between two criminal acts, these two intent elements are not mutually exclusive. *Cf. State v. Wilson*, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (finding distinct criminal conduct where the two crimes' respective statutes define different criminal intents). There was also no opportunity for Goldsberry to form a new intent from one crime to the next because the acts occurred simultaneously. *Cf. Wilson*, 136 Wn. App. at 615 (the two acts were separated in time, providing an opportunity for the completion of the assault and the formation of a new intent to reenter the house and harass the victim). These circumstances strongly suggest that Goldsberry's primary objective was to frighten Thomas. Thus, if counsel had argued the issue, the trial court should have counted the assault and harassment of Thomas as the "same criminal conduct." Under RCW 9.94A.525(5)(a)(1), the felony harassment and assault would have been calculated as a single offense, reducing his total offender score and standard sentencing ranges. Goldsberry has demonstrated prejudice and therefore satisfied both prongs of the *Strickland* test. Accordingly, we vacate the sentence and remand for resentencing of these

crimes as one in calculating the offender score.

IV. Statutory maximums

Goldsberry argues that the trial court failed to specify which count (felony harassment or second degree assault) the 10 year harassment no-contact order for Thomas pertains to and that clarification is necessary.[5]

Trial courts may impose crime-related prohibitions, including no-contact orders, for a term of the maximum sentence for a crime. *State v. Aremendariz*, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). Generally, we review a trial court's crime-related prohibitions for an abuse of discretion. *Aremendariz*, 160 Wn.2d at 110. Here, the trial court had the authority to impose a 10 year no-contact order pursuant to the second degree assault conviction, a class B felony with a 10 year statutory maximum. Any error in failing to specifically relate the order to one of the convictions is harmless.

V. SAG Issues

Goldsberry first argues that his attorney was ineffective for failing to call witnesses such as Williams and Kathleen. But both testified at trial and were cross examined by defense counsel. Thus, the error, if any, was harmless.

Goldsberry next argues that Williams did not fill out her own report of the incident; that it was instead filled out by a police officer. This matter is outside the record and is therefore not reviewable on direct appeal. *McFarland*, 127 Wn.2d at 333.

Finally, Goldsberry claims that he never pulled back the bow, he never pointed it at anyone, he never said, "Are you ready to die," and that he did not want to hurt anyone. We defer

[5] Goldsberry also challenged the no-contact order against Williams, but we need not address this issue as we reversed and dismissed the conviction for felony harassment against Williams.

to the jury on all issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). In this case, the jury obviously found Thomas credible. Her testimony was sufficient to convict Goldsberry of felony harassment and second degree assault beyond a reasonable doubt. We will not disturb these facts on direct appeal.

We dismiss Goldsberry's conviction for felony harassment against Williams. We affirm the remaining convictions, but remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, J.

Penoyar, A.C.J.